

¹ The Board issued a decision and order in this matter on January 10, 2006. Because no copy was sent to the authorized representative, the Board held that the decision was improperly issued and void *ab initio*. The Board issued an order vacating its January 10, 2006 decision and reinstating the appeal. Docket No. 05-1888 (issued June 27, 2007), *petition for recon. granted*, Docket No. 05-1888 (issued August 4, 2008) (order affirming prior Board order as modified). Appellant's attorney has requested that the Board proceed to a decision.

FACTUAL HISTORY

On February 15, 2003 appellant, then a 64-year-old carrier, filed a claim alleging that the osteoarthritis in his knees was a result of climbing stairs and many hours of walking on his mail route. He eventually stopped work on December 30, 2003 and did not return.

A conflict in medical opinion arose between Dr. Dennis P. McHugh, appellant's osteopath, and Dr. Robert Franklin Draper, Jr., an Office referral orthopedic surgeon. Dr. McHugh reported that working as a mail carrier contributed to appellant's nonoccupational osteoarthritis. Dr. Draper reported that appellant's knee condition was not associated with on-the-job functions. To resolve this conflict, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Walter W. Dearolf, III, a Board-certified orthopedic surgeon.

On June 22, 2005 Dr. Dearolf related appellant's history and complaints. He reviewed the records of other physicians and the Office's statement of accepted facts. Dr. Dearolf described his findings on physical examination. Appellant had a reciprocal gait with no limp. He was able to get on and off the examination table himself. Appellant had full range of motion in both hips. There was a mild varus about both knees, which fully extended and flexed to 115 degrees. There was no instability to anterior or posterior or medial or lateral testing. Lachman's test was negative. There was no effusion. There was mild pain with patellofemoral grinding bilaterally but no patellofemoral crepitation. There was mild medial joint tenderness bilaterally. X-rays from September 2, 2004 showed some medial joint narrowing and some patellofemoral degenerative disease consistent with degenerative arthritis of both knees.

Dr. Dearolf diagnosed bilateral knee osteoarthritis or degenerative joint disease. It was his opinion that this was an age-related process unrelated to appellant's employment activities. Dr. Dearolf explained prolonged standing or walking could temporarily aggravate the condition, but that this temporary aggravation of symptoms ceases once the activity level is reduced. He stated that this was thus not an injury-related disease process. There were no injury-related factors of disability and appellant's restrictions were based on his preexisting conditions.

In a decision dated July 19, 2005, the Office accepted appellant's claim for temporary aggravation of degenerative joint disease in both knees, which resolved effective December 30, 2003, the day appellant stopped work. It found that Dr. Dearolf's opinion represented the weight of the medical evidence and established that appellant's work-related aggravation ceased when he stopped work on December 30, 2003.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Once the Office accepts a claim it has the burden of justifying modification or termination of compensation. After it has determined that an employee has disability causally related to his employment, it may not terminate compensation without establishing that the disability has ceased or is no longer related

² 5 U.S.C. § 8102(a).

to the employment injury.³ The fact that the Office accepted an employee's claim for a specified period of disability does not shift the burden of proof to the employee. The burden is on it with respect to the period subsequent to the date of termination or modification.⁴

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁵ When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁶

ANALYSIS

A conflict arose between appellant's physician and the Office referral physician on whether appellant's bilateral knee condition was employment related. The Office properly referred appellant to an impartial medical specialist to resolve the conflict.

The Board finds that Dr. Dearolf, the impartial medical specialist and Board-certified orthopedic surgeon, based his opinion on a proper factual and medical background. The Office provided him with appellant's entire case record and a statement of accepted facts, both of which he reviewed. Dr. Dearolf related appellant's history and current complaints. He also physically examined appellant and read x-rays of both knees. So Dr. Dearolf built his opinion on a proper foundation.

The Board further finds that Dr. Dearolf offered a medical opinion that appears sound, rational and logical. His findings on physical examination, a year and a half after appellant stopped work, were minimal: a mild varus, only mild pain with patellofemoral grinding, and only mild medial joint tenderness. Otherwise, the examination was unremarkable: reciprocal gait, no limp, no difficulty getting on or off the examination table, full range of motion, no instability, no effusion, negative Lachman's, no crepitus with patellofemoral grinding. X-rays did show some medial joint narrowing and some patellofemoral degenerative disease, but these findings barely expressed themselves on examination.

Dr. Dearolf concluded that appellant's bilateral knee condition was simply an age-related process. This conclusion appears consistent with appellant's age at the time of examination. It also appears consistent with appellant's minimal findings. Had employment activities materially worsened both knees on a permanent basis, one would expect to see the clinical evidence of a material worsening, something more substantial than the minimal findings reported here. Given appellant's largely unremarkable examination, any physician supporting a permanent material

³ *Edwin Lester*, 34 ECAB 1807 (1983).

⁴ *See Raymond M. Shulden*, 31 ECAB 297 (1979); *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

⁵ 5 U.S.C. § 8123(a).

⁶ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

worsening would need to provide rather convincing rationale to avoid the appearance of speculation. For his part, Dr. Dearolf explained that prolonged standing or walking could temporarily aggravate symptoms, but such aggravation would stop once the activity level was reduced. He is a Board-certified orthopedic surgeon, and his opinion appears well rationalized. Appellant stopped work on December 30, 2003. So it follows that the work-related aggravation stopped at that time.

On appeal, appellant's attorney faults Dr. Dearolf's use of the word "injury," which he suggests connotes a traumatic injury "frame of reference." Because appellant's claim was an occupational and not a traumatic injury claim, the attorney believes Dr. Dearolf based his opinion on an incorrect premise.

The Board finds no merit in this argument. Dr. Dearolf gave no indication he was under any such impression. The history he reported and the case record he reviewed make clear that appellant's claim was of an occupational nature. Dr. Dearolf's statement that "this is not an injury-related disease process" and "there are no injury-related factors of disability" is entirely consistent with the occupational nature of appellant's claim.

Because the opinion of the impartial medical specialist is based on a proper history and is sufficiently rationalized, the Board finds that it must be accorded special weight in resolving the conflict. As the weight of the medical opinion evidence supports that the employment-related aggravation of appellant's bilateral knee condition resolved when he stopped working, the Board finds that the Office met its burden of accepting a temporary aggravation ending December 30, 2003. The Board will affirm the Office's July 19, 2005 decision.

CONCLUSION

The Board finds that the Office met its burden of proof to establish that the employment-related aggravation of appellant's bilateral knee condition resolved by December 30, 2003, the date he stopped working.

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board